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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1177

THE FLUOR CORPORATION, LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY and MOSHER STEEL COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

HAROLD C. WARNOCK
Ninth Floor Valley National Bldg.
Tucson, Arizona 85701

Attorney for THE FLUOR CORPORATION AND SURETIES, *Petitioners*

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---

The Fluor Corporation, Ltd., Federal Insurance Company, Vigilant Insurant Company, Insurance Company of North America, General Insurance Company of America, Seaboard Surety Company, American Re-

Insurance Company, Employers Reinsurance Corporation and General Reinsurance Corporation, petitioners herein, respectfully pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit rendered January 6, 1969 in this cause.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, to which this petition is directed, was issued January 6, 1969. It is not yet reported, and is appended as Appendix A. No opinion was rendered by the United States District Court for the District of Arizona.

JURISDICTION

No judgment has been entered by the Court of Appeals. On February 19, 1969 it entered its order staying issuance of judgment pursuant to Rule 41(b) Federal Rules of Appellate Procedure. Jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. §1254(1). Separate motions for rehearing by all parties were denied February 11, 1969.

QUESTIONS PRESENTED FOR REVIEW

1. Is a prime contractor liable under the Miller Act to a materialman of a second-tier subcontractor because the first-tier subcontractor guaranteed payment to the materialman; or, in other words, is a mere promise of payment, by a subcontractor to a person not otherwise entitled to recover under the Act, a "direct contractual relationship with a subcontractor" within the meaning of 40 U.S.C. §270(b)?

2. May a Court of Appeals award prejudgment interest on a claim the amount of which was not capable of being ascertained by computation

at the time of institution of suit, reversing a judgment of the trial court denying prejudgment interest based on a finding that the claim was unliquidated, there being no statutory authority or evidence to support the ruling of the appellate court?

3. Is it denial of due process for an appellate court to treat, as wholly disposing of the issue of prejudgment interest, a trial stipulation as to the value of stock received by the plaintiff as a credit on its claim?

4. Does the decision in question conflict with *Millers' National Ins. Co. v. Wichita Flour M. Co.*, 257 F.2d 93 (C.A. 10, 1958)?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are printed as Appendix B hereto.

STATEMENT OF THE CASE

This action was filed by the use plaintiff, Mosher Steel Company, on January 23, 1963 to recover the sum of $321,053.54 (R. 1680). Of this amount $298,336.58 was sought from defendants Ward Industries Corporation, Union Tank Car Company, and Fluor Corporation, Ltd. and its sureties, for furnishing, fabricating and delivering steel used in the Titan II, Phase II, Missile site work at Davis-Monthan Air Force Base, Tucson, Arizona, and $22,716.96 was sought from defendants Union and Ward for furnishing, fabricating and delivering steel used in the similar work at Vandenberg Air Force Base, Lompoc, California. Judgment was ultimately entered on May 24, 1966 against defendants Ward and Union in the amount of $268,882.92 and against defendant Fluor and its sureties in the amount of $246,165.96 (R. 1240).

The Court found that the Mosher claim was unliquidated and denied prejudgment interest.

All defendants appealed and Mosher filed a cross appeal on the interest question. On appeal, the Court of Appeals sustained the judgment against the defendants and reversed the judgment denying interest, directing that the case be remanded to the District Court for further consideration on the cross appeal.

The facts which gave rise to the litigation are as follows:

In 1962 The Fluor Corporation Ltd. entered into a prime contract with the United States Government to construct certain missile facilities at Davis-Monthan Air Force Base near Tucson, Arizona, and posted the usual Miller Act bond.

Fluor let a first-tier subcontract to Union Tank Car Company, and Union in turn let a second-tier subcontract to IMI-Ward, a joint venture consisting of Idaho Maryland Industries, a corporation, (IMI) and Ward Industries Corporation.

As work progressed it appeared that the fabrication facilities of IMI would be inadequate to maintain schedule and Union requested IMI to arrange for another company to perform part of the work. An IMI superintendent arranged with Mosher to fabricate a portion of the steel to be used in the contract and to supply certain material. He represented to Mosher that it would be contracting with Union, but no purchase order was ever issued by Union and Mosher accepted a purchase order for the work from IMI-Ward. Mosher claimed, and the trial court held, that Mosher had refused to proceed with the work without an assurance of payment from Union and that Union's controller had

promised Mosher's credit manager that Union would pay Mosher and deduct the payment from sums due under its subcontract with IMI-Ward. Union denied that the promise had been made and proved that it had not only made no deductions from IMI-Ward's contract, but had paid IMI-Ward in full. The trial judge found that the promise had been made and based recovery by the plaintiff against Union on the oral promise. The court further held that the promise was a "direct contractual relationship" between Mosher and Union and, therefore, under the Miller Act. Fluor and the sureties on its Miller Act bond were also liable.

During the course of construction IMI encountered financial difficulties and on February 2, 1963, filed a petition under Chapter XI of the Bankruptcy Act. Mosher continued to deliver under its IMI-Ward purchase orders and made its last delivery on or about February 28, 1963.

The bankruptcy was settled by the distribution of IMI's stock, prorata, to its creditors and on December 31, 1963 the bankruptcy court ordered 642,107 shares of IMI stock distributed to Mosher. IMI later reorganized under the name of Allied Equities, and the stock was issued on a reverse 20-to-1 split so what Mosher actually received was 32,105 shares of the stock of Allied Equity Corporation.

At the trial the defendants contended that, under the doctrine of judicial estoppel, Mosher, having successfully asserted a claim against IMI in the bankruptcy court, and having received benefits therefrom, was barred from seeking recovery on the same claim against Union, Ward or Fluor. This was asserted as an absolute defense to Mosher's claim. The defendants asserted alternatively that, in the event Mosher secured judg-

ment against them, they would be entitled to a credit for the stock Mosher had received.

During the trial on December 1, 1964 (Tr. 681) Mosher's counsel informed the court he had "been unable to find any probative evidence" as to the value of the stock received by Mosher and offered to stipulate that it had a value of "one dollar and five-eights per share. This offer was accepted by the defendants.

In a judgment rendered May 24, 1966 the trial court held that the value of the stock received by Mosher was $52,170.62 and credited that amount to all defendants.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with decisions of this court in that it holds that a materialman to a second-tier subcontractor on a government contract is entitled to recover under the Miller Act against a prime contractor.

The decision below is in direct conflict with the decisions of this Court on the Miller Act, notably *Clifford F. MacEvoy v. U.S.*, (1944), 322 U.S. 102, 64 S. Ct. 890, 88 L.Ed. 1163, which is the leading case on the right of parties in the remoter relationships to recover under the Miller Act.

The fact that Mosher convinced the trial court that it had elicited an oral promise of payment from Union's controller does not alter the situation.

The Miller Act provides in part (40 U.S.C. 270b):

> ". . . any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days . . ."

Union was the subcontractor for the prime contractor, Fluor, and IMI-Ward was a sub-subcontractor or second-tier sub-contractor. Mosher was a materialman to IMI-Ward. Whether Mosher was a materialman or a *sub*-sub-subcontractor is immaterial, *Elmer v. U.S.F. & G. Co.* (C.A.5, 1960) 275 F.2d 89. In either event, it is not entitled to recover under the Miller Act under the *MacEvoy* decision.

Nevertheless, the Court found against Fluor and the Sureties and rendered judgment against them in the sum of $246,165.96. It also found against Ward as a member of IMI-Ward, to which the materials were delivered (Conclusion of Law 4, R.1238) and against Union (Conclusion of Law 6) on the basis of the telephone promise by Union's controller. The facts found by the Court as to this promise are embodied in Findings 35 and 38 (R. 1231, 1232) and are the foundation for the Court's Conclusion of Law No. 3:

> "3. Mosher had a direct contractual relationship with Union, and Mosher gave Fluor the written notice required by 40 U.S.C. Section 270b."

This Conclusion is the sole basis for the judgment against petitioners.

It is the position of petitioners that, even assuming that the findings and conclusions have support in the record and the law, the relationship found to exist between Mosher and Union is not the "direct contractual relationship" contemplated by the Miller Act. In considering this question, it is necessary to ascertain and give effect to the intention and purpose of the legislature in the adoption of this statute. This is the fundamental rule of statutory construction. 82 C.J.S. Statutes § 321.

"Direct contractual relationship" is not defined in the statute, but it is clear that the act, which is for the

protection of materialmen, laborers and subcontractors, was intended to protect persons having contractual relationship with a subcontractor *as a materialman, laborer or sub-subcontractor*. As stated in *MacEvoy*:

> "The proviso of Section 2(a) which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who gives the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and the expressed will of the framers of the Act" (88 L.Ed. 1168).

In support of this statement the Court appends the following footnote:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond. H.Rep.No. 1263 (74th Cong. 1st Sess.), p. 3."

In essence, the judgment held that Union had promised Mosher that it would pay IMI-Ward's debt if that joint venture failed to pay.

Whether the resulting legal relationship is suretyship or guaranty, or a contract for the benefit of a third party, or some other type of secondary liability, there is no language in the Miller Act which suggests, implies or infers that the Congress intended that the protection of the Miller Act should extend to persons who claim

a right to payment *other than as a materialman, laborer, or subcontractor.*

The fact that Mosher is also a materialman is beside the point. The judgment it seeks to sustain is based, not on that fact, but on the fact that the Court found that Union had promised to pay IMI-Ward's debt to Mosher.

That judgment cannot be sustained against these appellants unless Mosher brings itself within the statute.

As the Supreme Court said in *U.S. ex. rel. Sherman v. Carter*, (1951), 353 U.S. 210, 1 L.Ed.2d 776, 782:

> "The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of non-federal buildings. The essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his supplies of labor and material. Thus the Act provides a broad but not unlimited protection."

Exhaustive research has failed to produce a single case in which a court has held that a claimant, too remote in the chain of subcontracts to come under the protection of the Miller Act, is entitled to recover against the prime contractor and its sureties because it had received a promise from the subcontractor that it would be paid.

Mosher did not have a direct contractual relationship with Union as a *laborer, materialman or subcontractor.* To hold that *any person* could recover on the Miller Act bond merely because of the existence of a direct contractual relationship with a subcontractor, would completely distort the intent and purpose of the Congress in adopting the Miller Act. As was said in MacEvoy:

> "Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself."

There is no conceivable way in which Fluor could protect itself in the fact situation presented by this case.

The judgment against Fluor and the Sureties is erroneous and should be reviewed.

2. When the Appellate Court reversed the trial court's judgment denying prejudgment interest because plaintiff's claim was unliquidated, it did so without statutory authority or evidence to support its ruling.

Furthermore, the reversal denied petitioners and the other defendants due process because the Appellate Court treated, as disposing of the entire interest issue, a trial stipulation made by the parties as to the value of certain stock received by plaintiff as a credit against its claim.

The Miller Act makes no provision for interest, and Federal courts uniformly hold that state law is therefore applicable as to interest on Miller Act claims. The Arizona statute on interest appears in Appendix B. No Arizona law authorizes the imposition of prejudgment interest on unliquidated claims. The Court of Appeals erroneously stated that the parties were in disagreement as to whether California or Arizona law applied and cited (Footnote 13) a recent addition to a California statute permitting the discretionary allowance of prejudgment interest on unliquidated claims. The relevancy here is obscure, since the trial judge had held the claim to be unliquidated and had denied interest.

But the fundamental error is not a matter of state

law. Rather, the error lies in the court's misunderstanding of the situation at the trial and the effect of stipulation of the parties as to the value of the IMI stock received by Mosher. At the trial the defendants took the position that, under the doctrine of judicial estoppel, Mosher's claim in bankruptcy against IMI, and its acceptance of benefits from that claim barred it from asserting inconsistent claims against the defendants. Alternatively, the defendants asserted they would be entitled to a credit in the amount of the benefits received by Mosher.

Mosher did not concede any credit was due. Its pre-trial memorandum, (R.T.228), stated:

> "The Plaintiff's position is that the court should adjudicate which party in this action shall be given credit for the value of said stock, if and when said stock is received by Plaintiff."

During the trial Mosher was apparently unable to prove the value of the IMI stock and in this regard the Court advised plaintiff's counsel (R.T.449):

> "It appears in the record the plaintiff has received something on the transaction that gives rise to its claim and certainly there would be a credit on it. As to what the credit would be that is a matter of your proof. If counsel can stipulate on something, fine, but otherwise I think, you will have to show the proper credit."

Later in the trial the following transpired (R.T.681):

> "MR. PURNELL: One final thing, Your Honor, before plaintiff rests. The matter of the stock or value of the stock. Does the Court deem that that is a part of the plaintiff's case at this time or does the Court agree with the plaintiff's position in its pre-trial memorandum that the value should be determined at a later time?

THE COURT: I believe if you are to offer evidence as to the value, now is the time.

MR. PURNELL: Now is the time to do it. Your Honor, we have been unable to find any probative evidence on the subject. The defendants have offered to stipulate that the shares are worth one dollar and five-eights —

MR. LOTTERMAN: You say the defendants have offered to stipulate?

MR. PURNELL: I beg your pardon, Mr. Warnock.

MR. LOTTERMAN: This is the first I have heard of it.

MR. PURNELL: Mr. Warnock and Mr. McConnell. We don't think that the plaintiff could, actually ever could and certainly cannot now obtain that much money for it, but under the circumstances, the nature of the matter is such we feel that all of the doubt should be resolved in favor of the defendants on this score and we are prepared to stipulate that the shares were worth a dollar and five-eights at the time they were received."

There was no stipulation that defendants would receive a credit, or that the amount of the credit was liquidated, or when a credit would be effective or otherwise as to the dollar value of the credit, and Mosher did not pursue the point.

When the court rendered its decision on May 24, 1966, it found the stock to be worth $52,170.62. The Court held that ". . . Mosher's claims against all parties are unliquidated until judgment is entered." (R. 1240) and therefore denied prejudgment interest.

The general law, as well as that of Arizona and California, is that a plaintiff may recover prejudgment interest only if the amount of the recovery is, from the

institution of the action, "capable of ascertainment by mere computation." *U.S.F.&G. v. California-Arizona Const. Co.*, 21 Ariz. 172, 186 P. 502.

In this kind of case, interest is allowed as damages for the detention of money. 47 C.J.S. *Interest*, §3; *Arizona Eastern R. Co. v. Head*, 224 P. 1057 (Ariz.) Consequently, interest is not allowed if ". . . the person liable does not know the sum he owes and therefore can be in no default for not paying." *Arizona Eastern R. Co. v. Head*, supra. In other words, such a claim is unliquidated. That was the situation before the trial court.

IMI applied to the bankruptcy court for relief on February 2, 1962. Mosher's last invoice to IMI-Ward was dated February 28, 1962, and thereafter Mosher filed its claim against IMI in the bankruptcy court. As a creditor of IMI, at all times after February 2, 1962, Mosher was entitled to receive at least a pro rata payment from the bankruptcy, and any party electing to pay Mosher's claim on behalf of IMI would be required to take such prospective payment into consideration.

These petitioners had no contractual relation with Mosher and IMI-Ward or knowledge of their dealings. but suppose that Fluor, by some sort of prescience, had become aware of the trouble that was brewing and determined to pay off Mosher on February 28, 1962, to avoid the accumulation of interest or the interruption of the project?

What amount would have been due Mosher?

Would it be reasonable to hold that Fluor had a duty to pay the entire amount of Mosher's invoices, hoping for a refund from Mosher when it received payment out of the bankruptcy?

The answer obviously is "No." There was no possible way in which Fluor, or for that matter, any of the defendants, could have ascertained by computation the amount due Mosher.

Fluor had no relationship with Mosher and the claim against us is not for materials furnished, but for the balance owing Mosher from IMI *after* crediting dividends out of the bankruptcy.

The opinion says Mosher should not be denied prejudgment interest because of "seeking and obtaining partial payment from a joint obligor." This comment cannot apply to Fluor and the sureties, which were not joint obligors, and while it may be applicable to Union and Ward, cannot justify an award of prejudgment interest, especially against Fluor.

The Court of Appeals has held to be liquidated a claim, the amount of which was not settled until nearly two years after commencement of the litigation and nearly three years after the delivery of the material. While these facts alone indicate why the defendants are entitled to contend in good faith that the amount of the claim could not be ascertained by computation, the vice of the court's decision is the effect which it gave to the stipulation of the parties. That stipulation, it is clear from the above quoted portions of the record, was made solely for the purpose for expediting the trial. It amounted to an agreement that, as Mosher represented, the market value of IMI stock when received by Mosher was one and five-eighths. It left open the question of whether any credit was to be allowed and whether such credit if it was to be allowed, was to be given as of the date the issuance of stock was ordered, the date of receipt, or the date of judgment, or some other date.

Neither Mosher nor the defendants were ever in a position, until judgment was rendered, to be able to ascertain by "probative evidence" (R.T.681) the net amount of Mosher's claim. This was obvious to the trial court, which was clearly right on this issue.

The decision to grant prejudgment interest, made at the appellate level and based on the appellate court's erroneous construction of the stipulation, deprived these petitioners of their day in court on the interest issue, and denied them due process of law.

3. The Court of Appeals decision, treating the stipulation as justifying the imposition of prejudgment interest from the date plaintiff's claim became due, conflicts with the decision of another Court of Appeals.

The Court of Appeals for the Ninth Circuit held that plaintiff was entitled to prejudgment interest on the whole amount of its invoices from March 30, 1962 to the date Mosher received the stock in partial payment, and thereafter on the difference. The Court conceded that it had found no decisions directly on point.

The decision is in direct conflict with *Millers' National Ins. Co. v. Wichita Flour M. Co.*, 257 F.2d 93 (C.A. 10, 1958) which involved a question as to insurance coverage. During the trial the parties ". . . stipulated that the 'maximum insurance' applicable to the damaged unit was $77,447.45 . . . The court was authorized to enter judgment on the respective policies in the sums stated . . .if it was determined that the loss was covered by the policies." (257 F.2d 103)

Under this fact situation the Tenth Circuit held that the plaintiff was entitled to recover interest ". . . only from respective dates of the stipulations . . . ."

The conflict between circuits is emphasized by the language of the Ninth Circuit:

> "But uncertainty about the precise value of the partial payment should not bar Mosher from compensation for the continued loss of the use of the much larger balance remaining unpaid."

The Tenth Circuit is clearly right under the fact situation with which it dealt, *because the parties authorized the court to enter judgment for the stipulated amount if liability was proved.*

In the case at bar the claim *was never capable of* computation and became fixed only when judgment was rendered. The parties in this case did not stipulate that a judgment could be rendered for certain amount. The effect of the decision is to penalize the defendants for over $100,000.00 of prejudgment interest, for having made a simple stipulation as to a fact, in order to expedite the trial. If it is argued that the stipulation was ambigouous the language in *Henry Hanger & Display Fixture Corp. v. Sel-O-Rak Corp.*, 270 F.2d 635 (C.A. 5, 1959) is applicable:

> ". . . The courts cannot, under the guise of construction, insert into an agreement an essential element such as the subject matter to which the agreement 'shall apply'."

In this case interest should be allowed only from the date of judgment.

CONCLUSION

For the reasons stated, petitioners pray that a writ of certiorari issue to review the judgment of the court below.

HAROLD C. WARNOCK
Ninth Floor Valley National Bldg.
Tucson, Arizona 85701
623-8661

Attorney for THE FLUOR CORPORATION AND SURETIES, *Petitioners*

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., et al.,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,
Appellants and Cross-Appelles,

vs.

UNITED STATES OF AMERICA, ex rel.
MOSHER STEEL COMPANY,
Appellees and Cross-Appellants.

No. 21,307
No. 21,307 A
No. 21,307 B
No. 21,307 C

[January 6, 1969]

Appeal from the United States District Court for the District of Arizona

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Before: HAMLIN, BROWNING, and ELY, Circuit Judges

BROWNING, Circuit Judge:

The district court rendered judgment in favor of Mosher Steel Company and against the various appellants for prices agreed to be paid for materials furnished and services rendered by Mosher in the fabrication of steel used in the construction of missile launch facilities in Arizona and California.[1] We affirm the trial court's

[1] Prior litigation in this court arising out of these projects is reported in Dragor Shipping Corp. v. Union Tank Car Co., 361 F.2d 43 (1966); 371 F.2d 722 (1967); 378 F.2d 241 (1967).

judgment except as it denied prejudgment interest. As to this, we reverse and remand for further proceedings.

Appellants strongly attack many of the trial court's findings. We have, therefore, examined the record with care. We find substantial conflicts in the testimony and the documentary evidence, and even stronger differences in the construction that the parties urge should be placed on events leading to the litigation and the inferences that should be drawn from them.[2] We have not asked ourselves whether we would have resolved the conflicts and ambiguities as the trial judge did, or whether we would have drawn the same inferences. *United States v. Real Estate Boards*, 339 U.S. 485, 495-96 (1950). We have, however, satisfied ourselves that upon an examination of the entire evidence we are not "left with the definite and firm conviction that a mistake has been committed" in any of the trial court's findings. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960). We therefore accept the trial court's findings, and base the statements of fact in this opinion upon them.

Fluor Corporation, Ltd., was the prime contractor for the construction of the Arizona launch facilities, and the insurance company appellees were sureties on Fluor's performance bond. Matich Bros. and M. M. Sundt Corp., who are not parties to this litigation, were the prime contractors for the California launch facilities.

Fluor and Matich & Sundt entered into separate first tier subcontracts with Union Tank & Mfg. Co.[3]

[2] The parties are well aware of these conflicts and differences; they have explored them in great detail in their briefs. No useful purpose would be served by publishing them here.

[3] Union acted principally through a division known as Graver Tank & Mfg. Co., and the trial court's findings refer to "Union" and "Graver" interchangeably.

Union, in turn, entered into second tier subcontracts for steel fabrication work with IMI-Ward, a joint venture created by Idaho-Maryland Industries Inc. and Ward Industries Corporation.

When IMI-Ward fell behind schedule in the performance of its subcontract, Union, on October 10 or 11, 1961, instructed an IMI-Ward official to "farm out" the steel fabricating work, and approved the selection of Mosher to perform it. Because the IMI-Ward official did not think Mosher would accept an IMI-Ward purchase order, Union agreed that if a satisfactory contract could be worked out with Mosher, Union would give Mosher a Union purchase order.

On October 13, the IMI-Ward official negotiated a detailed contract with Mosher for the required work. As anticipated, Mosher would not accept IMI-Ward's credit. The IMI-Ward official then advised Mosher that Union purchase order would be issued. On October 16, Mosher set out the agreed-upon terms in a letter addressed to the IMI-Ward official. That official signed the letter on behalf of Union and sent copies of the executed writing to Union. Mosher then began performance of the work.

Union told Mosher on October 23 that Union's purchase order would be issued within two or three weeks, and that the October 16 letter would serve as an interim purchase order until the formal purchase order could be mailed. Thereafter, on October 31, IMI-Ward asked Mosher, as a matter of accounting convenience for IMI-Ward, to change the designated customer on the job from Union to IMI-Ward, and to accept IMI-Ward purchase orders in place of those of Union. Mosher agreed, provided Union would be responsible for payment.

IMI-Ward sent Mosher two purchase orders on November 3 covering the work to be done. Mosher informed Union that completed material would not be shipped until Mosher received confirmation that Union would be responsible for payment.

On November 15, after securing IMI-Ward's approval, Union advised Mosher that Union would pay Mosher directly and deduct the payments from the amounts Union was to pay IMI-Ward under the latter's subcontract.[4] Mosher understood, and Union intended Mosher to understand, that its commitment extended to all the work covered by IMI-Ward's purchase orders of November 3. Upon receiving Union's commitment, Mosher changed the customer's name from Union to IMI-Ward, completed the work, and delivered the fabricated steel to the job sites.

On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act. Mosher submitted a proof of claim in these proceedings, and it was issued IMI stock under a plan of reorganization. Except for this stock, Mosher was not paid for its work.

The district court gave judgment against Union, finding that the commitment Union gave Mosher on November 15 and Mosher's completion and delivery of the work thereafter created a contract between Union

[4] The commitment was given orally. Union told Mosher that it would be confirmed by a subsequent letter. Although the letter was prepared by Union, it was not sent because Mosher continued to make shipments without it. Union argues that the sending of this letter was intended to be condition precedent to the formation of a contract, and that the trial court's finding to the contrary is clearly erroneous. We think the finding is supported by evidence from which the trial court could conclude that the promised letter was intended to be a written confirmation of an agreement already reached. Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'r Corp., 305 F.2d 659, 664-65 (9th Cir. 1962), upon which Union relies, is inapplicable for this reason.

and Mosher obligating Union to pay Mosher directly. Judgment was rendered against Fluor and its sureties under the Miller Act, 40 U.S.C. § 270.[5] The district court entered judgment against Ward on the ground that IMI-Ward's November 3 work orders and Mosher's fabrication and delivery of material pursuant to such orders created a contract between Mosher and IMI-Ward obligating Ward to pay Mosher in accordance with the terms and conditions of those orders.

Union contends that Mosher performed the work for IMI-Ward; that Union's agreement, if any, was only a guarantee to pay Mosher if IMI-Ward did not; and, being oral, this agreement to answer for the debt of another was unenforceable under the Statue of frauds.

Ward, on the other hand, contends that the only viable contract was an oral agreement between Mosher and Union arising on October 13, binding Mosher to perform the work and Union to pay for it. If there was a November agreement between Mosher and IMI-Ward, Ward argues, it required nothing of Mosher which Mosher was not already obligated to do under its October agreement with Union, and, therefor, any promise by IMI-Ward was not supported by consideration. Furthermore, the only consideration for which Mosher bargained was Union's unconditional promise to pay Mosher directly. Consequently, any promise by IMI-Ward was not bargained for and hence was unenforceable under our decision in *Colorado Nat'l Bank of Denver v. Boehm,* 286 F.2d 494 (1961).

As we read the district court's findings, the court determined that *both* Union and IMI-Ward assumed

[5] Since Fluor as not involved in the California project, the judgment against Fluor and its sureties was limited to the amount due for materials used in the construction of the Arizona facilities.

direct obligations to pay Mosher for the work. IMI-Ward contracted directly with Mosher to have Mosher perform the work described in the November 3 work orders in return for payment by IMI-Ward of the prices fixed in those orders. This agreement was subject, however, to the condition precedent that Union also agree to be directly liable for payment. When Union agreed to pay Mosher, it became directly bound to Mosher. Union's promise also satisfied the condition precedent to the direct contractual obligations between IMI-Ward and Mosher.[6]

In view of Union's obligations under its subcontract with Fluor and Matich & Sundt, Union had a substantial interest in assuring performance of the work by Mosher. As the direct court found, "in agreeing to pay Mosher directly, [Union] . . . acted primarily to protect and advance its own interests under its subcontracts . . ." Since Union's promise to pay was a direct and original undertaking rather than a collateral promise to pay IMI-Ward's debt, it was not within the Statute of Frauds, even though IMI-Ward was also obligated to pay for the work. *Holmes v. Suffrin*, 198 Ill. App. 45 (1916); *Peters v. Raven*, 159 Ill. App. 122 (1910); *Leisman & Co. v. Otto*, 64 Ky. (1 Bush) 225 (1866); *cf. Granite City Lime & Cement Co. v. Board of Educ. of School Dist. 126*, 203 Ill. App. 134 (1916). See 4 Corbin on Contracts § 926, p. 705.[7]

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[6] Ward argues that no agreement arose because Mosher rejected an element of IMI-Ward's initial offer, namely, that IMI-Ward's credit be substituted for that of Union. There was substantial evidence supporting the trial court's findings that IMI-Ward agreed to Mosher's counter-offer to accept IMI-Ward work orders and to substitute IMI-Ward for Union as the account customer if Union would agree to pay for the work.

[7] Union also contends that its committement was limited to materials produced for use in constructing the Arizona launch facilities. Although the testimony of one witness might be read as supporting the limitation for

As to Ward's argument that any promise made by Ward to Mosher in November was without consideration because of Mosher's pre-existing contractual obligation to perform the same work for Union, it should be noted that the district court did not conclude that a Union-Mosher contract arose in October. Even if such a prior Union-Mosher contract existed, IMI-Ward's subsequent promise would still have consideration. Under the arrangement finally agreed to, Mosher, at IMI-Ward's solicitation, undertook the additional obligation to designate IMI-Ward, rather than Union, as the customer, and to accept the IMI-Ward purchase orders. These new undertakings were sufficient to support IMI-Ward's promise to pay.[8]

Ward's reliance upon *Colorado Nat'l Bank of Denver v. Boehm, supra,* 286 F.2d 494, is also misplaced. Mosher's insistence upon a direct commitment from Union does not mean that this was the only consideration for which Mosher bargained. Mosher also sought and obtained a promise of payment from IMI-Ward. The fact that IMI-Ward's promise alone was not enough to satisfy Mosher, or that Union's promise alone might have been sufficient, is irrelevant. *See Granite City Lime & Cement Co. v. Board of Educ. of School Dist. 126, supra,* 203 Ill. App. 134; *Peters v. Raven, supra,* 159 Ill. App. 122; Restatement of Contracts §§ 111, 113.

Ward contends that Ward is not liable even if IMI is, because the extension of credit or the delivery of

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which Union argues, as Mosher points out, there was other evidence supporting the trial court's finding that Union's commitment covered payment for all of the work Mosher was to do — whether used in construction of the Arizona facilities or those in California.

[8] The basis for IMI-Ward's interest in these arrangements is suggested by the district court's finding that the prices which IMI-Ward had agreed to pay Mosher for the work were lower than those which IMI-Ward would collect from Union for the work.

goods to one member of a joint venture does not obligate the joint venture. The cases upon which Ward relies involve the assumption of liability by a joint venturer beyond the scope of his authority to act for the joint venture.[9] Here, however, the district court concluded on the basis of findings supported by substantial evidence that IMI's acts were authorized by and performed on behalf of the IMI-Ward joint venture.

Both Union and Ward argue that because Mosher filed a claim in the IMI bankruptcy proceedings representing that the amount due Mosher was an unsecured independent obligation of IMI, and because Mosher accepted a distribution of the stock of the reorganized debtor on the basis of this claim, it is estopped from asserting that Union and Ward are liable. The result urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.[10]

Thus, unlike the claimant in *Eads Hide & Wool Co. v. Merrill*, 252 F.2d 80 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover,

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[9] *See*, for example, Wreen v. Moskin, 226 App. Div. 563, 235 N.Y.S. 405 (1929); American Mut. Life Ins. Co. v. Hanna, Zabriskie & Daron, 297 Mich. 599, 298 N.W. 296, 299 (1941); and Matanuska Valley Bank v. Arnold, 223 F.2d 778 (9th Cir. 1955).

[10] Mosher's claim in the bankruptcy proceeding stated: "Claimant corporation claims that Ward Industries Corporation, as joint venturer with the Debtor, and Union Tank Car Company through its division, Graver Tank & Mfg. Co., are also liable to claimant corporation for the entire said debt, ... Claimant corporation's filing of the claim in this proceeding is made without prejudice to its rights against the said Ward Industries Corporation, and the said Union Tank Car Company . . . . In addition . . . claimant corporation has claimed that Fluor Corporation Ltd. and its sureties are liable . . . ."

Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding precluded an estoppel against Mosher in this litigation.[11]

In addition to defending against Mosher's claim, Union filed a counterclaim alleging that if it were liable at all it would be as a surety only, and praying that Mosher be required to seek satisfaction first from Ward. In its findings and conclusions the trial court did not refer expressly to Union's counterclaim. When the omission was called to the court's attention, the court entered a judgment that Union "take nothing by its counterclaim." Union contends that the existence of a principal-surety relationship not only was admitted in Mosher's answer to Union's counterclaim but was established by the evidence, and that, in any event, the district court erred in disposing of the counterclaim without entering findings of fact and conclusion of law as required by Fed. R. Civ. Proc. 52(a).

The purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment. *Seligson v. Roth*, __ F.2d __ (9th Cir. 1968). It is apparent to us that the trial court rejected Union's counterclaim because it found Union's relationship to the debt to be that of a direct obligor, not a surety. Contrary to Union's contention, Mosher did not admit in its

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[11] Mosher will not obtain double recovery. In computing the amount of the judgment, the trial court deducted the stipulated value of the stock received by Mosher in the bankruptcy proceeding.

pleadings that Union was merely a guarantor;[12] and, as we have said, the trial court's findings that Union agreed to a direct and primary obligation is not clearly erroneous.

On the basis of this finding we also reject the contention advanced by Fluor and its sureties that Mosher was not a "person having a direct contractual relationship with a subcontractor" of Fluor within the meaning of 40 U.S.C. § 270(b). We are not convinced that recognition of Mosher's claim will extend the coverage of the Miller Act beyond that intended by Congress, nor that the result will be to "impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself." *MacEvoy v. United States*, 322 U.S. 102, 110 (1944). Fluor could easily have protected itself by requiring appropriate security from Union. *See Hill v. American Surety Co.*, 200 U.S. 197, 204-05 (1906); *Mankin v. Ludowici-Celandon Co.*, 215 U.S. 533, 540 (1910).

We turn to Mosher's cross-appeal from the portion of the judgment which denied prejudgment interest on the amount found to be due under the contracts.

There is some disagreement among the parties as to whether the governing law is that of the state of the forum (Arizona) or of the states in which the contracts were to be performed (Arizona and California). Since there is nothing to indicate that the relevant law of the two states differs, we have not concerned ourselves with

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[12] In its answer to Union's counterclaim, Mosher admitted that it had alleged in the complaint that Union was a surety, but Mosher also stated "the amended Complaint includes other counts and allegations as therein set forth." These "other counts and allegations" of Mosher's complaint asserted that Union was directly liable to Mosher for the debt. "A party may . . . state as many separate claims . . as he has regardless of consistency . . . ." Fed. R. Civ. Proc. 8(e)(2).

the problem. The California rule is stated in section 3287, California Civil Code, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." Arizona follows the same general rule.[13]

Cross-appellees argue that Mosher's damages were not "certain or capable of being made certain by calculation" prior to judgment because of the disputed value of the IMI stock which Mosher received in partial payment of its claim in the IMI bankruptcy proceedings. The dispute over the stock's value was not resolved until the parties stipulated to its worth during the course of trial.[14]

Clearly, this circumstance did not render the

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[13] The California statute was enacted in 1872, and states the common-law rule. Restatement, Contracts § 337(a). Arizona has not codified the rule, but it is followed by the courts of that state. United States Fidelity & Guar. Co. v. California-Arizona Constr. Co., 21 Ariz. 172, 186 Pac. 502, 509 (1920); Palmcraft Dev. Co. v. Phoenix, 46 Ariz. 400, 51 P.2d 921 (1935); Schartz v. Schwerin, 85 Ariz. 242, 250, 336 P.2d 144, 149 (1959); Feighner v. Clarke, 2 Ariz. App. 286, 408 P.2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P.2d 513 (1966) (in banc); Betz v. Goff, 5 Ariz. App. 404, 406, 427 P.2d 538, 540 (1967).

A recent addition to the California statute provides that where an unliquidated contract claim is involved interest may be awarded, in the courts' discretion, for some or all of the period between the filing of suit and entry of judgment. Calif. Stats. 1967, ch. 1230, § 1.

[14] Cross-appellees also intimate that Mosher should be denied prejudgment interest because the issue of liability was disputed. The generally accepted rule is that uncertainty as to liability, as distinguished from uncertainty as to the amount of the damages, does not bar recovery of prejudgment interest. Restatement, Contracts § 337(a), comment d. Despite disputed liability, prejudgment interest was awarded in both Feighner v. Clarke, 2 Ariz. App. 286, 408 P.2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P.2d 513 (1966) (in banc); and Betz v. Goff, 5 Ariz App. 404, 406, 427 P.2d 538, 540 (1967). California cases to the same effect are collected in 5 U.C.L.A. L. Rev. 262, 266 n. 28 (1958).

amount of Mosher's claim uncertain until it arose. At a minimum, therefore, Mosher was entitled to prejudgment interest on the whole amount owing under the contracts from the date it became due (thirty days after February 28, 1962) to the date Mosher received the stock in partial payment.

It is equally apparent that Mosher was not entitled to interest after the latter date upon the portion of his claim which had been paid. But uncertainty about the precise value of the partial payment should not bar Mosher from compensation for the continued loss of the use of the much larger balance remaining unpaid. Interest on the difference between the amount due Mosher under the contracts and the value of the stock as determined at trial should be allowed from the date the stock was received to the date of judgment. Although we have found no decisions directly on point, this result is supported by analogous authorities.

Thus, even though the existence of an unliquidated counterclaim or set-off necessarily puts the amount payable in doubt, it is well settled that it does not render the claim itself uncertain or deprive the claimant of the right to prejudgment interest.[15] If the unliquidated set-off or counterclaim is based upon a breach unrelated to the sum due under the primary claim, interest is al-

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[15] Hansen v. Covell, 218 Cal. 622, 631-32, 24 P.2d 772, 775, 89 A.L.R. 670 (1933) (in banc); McCowen v. Pew, 18 Cal. App. 482, 483 *et seq*, 123 Pac. 354, 355-56; Hunt Foods v. Phillips, 248 F.2d 23, 26-27 (9th Cir. 1957) (Calif.). Other California decisions are collected in 14 Cal. Jur. 2d 79, 705-06, and 5 U.C.L.A. L. Rev. 262, 268 n. 37 (1958). *See also* Mall Tool Co. v. Far West Equip. Co., 45 Wash. 158, 273 P.2d 652, 663 (9th Cir. 1963); American Sur. Co. v. United States, 368 F.2d 475, 479-80 (9th Cir. 1966); 5 Corbin, Contracts § 1051, pp. 305-06.

"In short," Professor McCormick states, "it is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a 'liquidated sum.'" McCormick on Damages, § 54 p. 216 (1935).

lowed on the entire claim. The amount of the counterclaim or set-off as determined at trial is then deducted from this total. If, as in the present case, the unliquidated set-off or counterclaim constitutes a partial payment of the primary claim, interest is allowable on the balance due after deducting the amount of the set-off or counterclaim as determined at trial.[16]

The result we reach is also supported by the principle recently applied in *Coleman Eng'r Co. v. North American Aviation*, 55 Cal. Rep. 1, 420 P.2d 713 (1967). There, defendant argued that prejudgment interest was barred because a lesser amount of damages was awarded than plaintiff had originally demanded. The reduced claim resulted from the plaintiff's successful efforts in obtaining settlements with third persons and in salvaging materials. The Supreme Court of California held that under these circumstances uncertainty as to the amount due did not bar an award of prejudgment interest. It stated, "we are satisfied that reductions in damages due to plaintiff's efforts to mitigate damages should not preclude an award of prejudgment interest. If the rule were otherwise, a plaintiff might be encouraged to forego opportunities to mitigate damages so as not to jeopardize his right to prejudgment interest." Similarly, Mosher's right to prejudgment interest should not be denied because Mosher in seeking and obtaining partial payment from a joint obligor reduced the amount of its claim against cross-appellees.

The judgments are affirmed on the appeals and reversed for further consideration on the cross-appeal.

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[16] Hansen v. Covell, 218 Cal. 622, 631-32, 24 P.2d 772, 775-76 (1933) (in banc); Hunt Foods v. Phillips, 248 F.2d 23, 26-27 (9th Cir. 1957) (Calif.); and cases collected at 14 Cal. Jur. 2d § 79, pp. 705-06.

APPENDIX B

ARIZONA REVISED STATUTES § 44-1201. Rate of interest for legal indebtedness; limitation on rate of interest which may be contracted; interest on judgments

A. Interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing.

B. A rate of interest, not to exceed eight per cent per annum, if agreed to in writing, signed by the debtor, shall be paid. A judgment given on such agreement shall bear the rate of interest provided for in the agreement, and it shall be specified in the judgment.

FEDERAL RULES OF APPELLATE PROCEDURE, RULE 41 (b

(*b*) *Stay of Mandate Pending Application for Certiorari.* A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme ourt. Upon the filing of a copy of an order of the Supreme Court denying the peition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required a a condition to the grant or continuance of a stay of the mandate.

49 STAT. T 94, 40 U.S.C. § 270b. (a)

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to proescute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

62 STAT. 928, 28 U.S.C. § 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;